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No. 04-515

Supreme Court, U.S.
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In The
Supreme Court of the United States

LARRY BILL ELLIOTT,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should certiorari be granted to review petitioner's challenge to Virginia's vileness aggravating factor even though this Court is without jurisdiction to consider it because the Supreme Court of Virginia expressly refused to consider the issue due to petitioner's failure to preserve it properly?

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STATEMENT OF THE CASE

I. Proceedings

Larry Elliott had two capital murder trials. In 2002, he was tried by a jury in the Circuit Court of Prince William County, Virginia, found guilty of capital murder and sentenced to death. In a post-trial hearing, the circuit court granted Elliott's motion for a new trial on the basis of an after-discovered claim of juror bias.

The new trial commenced with the empanelling of a new jury on March 25, 2003. On April 2, 2003, the new jury found Elliott guilty of the capital murder of Dana Thrall in the commission of the killing of Robert Finch. Va. Code § 18.2-31(7) (capital murder offense defined as the willful, deliberate and premeditated killing of more than one person as part of the same transaction). The jury also found him guilty of the use of a firearm in the commission of capital murder, the first-degree murder of Robert Finch and the use of a firearm in the commission of first-degree murder. After a separate sentencing hearing, the jury sentenced Elliott on April 4, 2003, to death for the capital murder, life in prison for the first-degree murder and a total of eight years in prison for the firearms offenses. The jury based the death sentence on Virginia's aggravating factors of torture, aggravated battery and depravity of mind. Va. Code § 19.2-264.4. On May 22, 2003, the trial court held a post-verdict hearing at which it considered the probation officer's report and argument of counsel. The court imposed the sentences which had been fixed by the jury. The court entered final judgment on June 13, 2003.

On March 5, 2004, the Supreme Court of Virginia unanimously affirmed Elliott's capital murder conviction and death sentence. *Elliott v. Commonwealth*, 593 S.E.2d

270 (Va. 2004). On June 17, 2004, the Court denied his petition for rehearing. Elliott filed his certiorari petition on October 15, 2004.

II. Facts

At 4:00 a.m. on January 2, 2001, the murdered body of Robert Finch was found by police officers in Finch's townhouse. They also found, lying in the kitchen in a pool of blood, the wounded body of Dana Thrall, Finch's girlfriend who lived there. Thrall had been shot numerous times in her head and chest and had been beaten in her head. She died a short time later, leaving two small sons who were in the house during the murders. Shortly before the murders, Larry Elliott was seen in the neighborhood. Forensic evidence showed conclusively that Elliott's DNA was contained in blood Elliott left on the fence gate in Finch's backyard. Elliott, a married man, had become heavily involved in a relationship with Rebecca Gragg, Finch's ex-girlfriend. Elliott knew that Gragg was in the midst of a heated child-custody proceeding with Finch who was the father of Gragg's children. Shortly before the murders, Gragg told Elliott that she and Finch had resumed a romantic relationship. At the time of the murders, Gragg was driving home to Virginia from a vacation with her children in Florida. *Elliott*, 593 S.E.2d at 273-78.

The Virginia Supreme Court found as follows concerning Elliott's challenge to Virginia's aggravating factors:

> Prior to the [first] trial, Elliott had filed numerous motions, among which were motions to have the Virginia capital murder and death penalty statutes declared unconstitutional and to have the jury instructed that, if the Commonwealth

presented evidence of vileness during the penalty determination phase of the trial, the jury was to be unanimous in its determination of the elements of the act that caused it to be vile. The trial court denied these motions without comment. After the mistrial was declared, Elliott did not renew any of these motions or otherwise request that the trial court adopt the pre-trial rulings of the first trial and apply them to the conduct of the retrial.

The trial court, having ruled that the Commonwealth could not argue Elliott's future dangerousness to society as an aggravating factor supporting the imposition of the death penalty, ruled that the case would be submitted to the jury only on the vileness aggravating factor. During consideration of the jury instructions, Elliott's counsel stated that he agreed with the proposed instruction which, in relevant part, defined the vileness aggravating factor as requiring that the murder of Thrall "was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery of the victim beyond the minimum necessary to accomplish the act of murder."

Elliott did not request an instruction requiring that the jury agree unanimously on the basis for finding the murder to have been vile, as he had requested in his pre-trial motion prior to his first trial. Rather, Elliott's sole assertion at this point was that, "for the record," he objected to the jury being instructed on capital murder because the evidence would not support a finding that the murder of Finch was vile. While conceding that he had no authority other than "a new article [he had] read," Elliott's counsel contended that where the capital murder charge was premised

> on there having been one or more killings as part of the same transaction, the jury was required to find that all the killings were vile. The trial court overruled this objection and again asked if Elliott concurred with the instructions. Elliott's counsel replied, "Yes, other than the objection I've made."

Elliott, 593 S.E.2d at 278.

The Virginia Supreme Court found as follows concerning the sentencing phase of trial:

> Code § 17.1-313(C)(1) requires that we determine whether the jury imposed the sentence of death under the influence of passion, prejudice, or any other arbitrary factor. Elliott makes no particularized argument that the jury's verdict was not the product of a reasoned and dispassionate deliberation. Nor does our review of the record in this case disclose that the jury failed to give fair consideration to all the evidence both in favor and in mitigation of the death sentence, or was otherwise improperly influenced in favor of imposing the death penalty. Accordingly, we hold that the sentence of death was not imposed under passion, prejudice, or any arbitrary factor.
>
> With respect to the consideration "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," Code § 17.1-313(C)(2), Elliott contends that "the Commonwealth has never imposed such a sentence upon a man with as long and accomplished a record of service to his country as" Elliott. He further contends that "this case lacks the characteristics that normally distinguish the cases in which the death penalty is imposed based upon

multiple homicides and vileness from those in which juries choose to impose life imprisonment."

During the penalty determination phase of the trial, the jury heard testimony recounting Elliott's service as a soldier and non-commissioned officer in, and later as a civilian employee of, the United States Army. The jury also heard evidence throughout the course of the trial that Elliott betrayed his wife of twenty-three years, pursuing a former prostitute and squandering hundreds of thousands of dollars on this illicit relationship. The evidence showed that Elliott murdered two innocent people in a brutal and premeditated manner, showing no remorse for and purposefully seeking to conceal his crimes. The murder of Thrall was particularly heinous in that it appears she was a victim of opportunity, killed while her young children were nearby and simply because she was present in the home with Finch or perhaps because she saw and could have identified Elliott.

The jury could reasonably have concluded from Elliott's actions in his secret relationship with Gragg that he had renounced the values he purported to support and follow in his public life. Faced with the incongruent reality of Elliott's two lives, the jury was well within its province to determine that the mitigating value of Elliott's years of service in the armed forces did not outweigh his culpability for the death of Thrall under the circumstances of that murder. . . .

Even though no two capital murder cases are identical, we are confident that, given the heinousness associated with the murder of Thrall, the sentence of death imposed on Elliott is neither excessive nor disproportionate to sentences

> generally imposed by other sentencing bodies in this Commonwealth for crimes of a similar nature considering the crime and this defendant.

Elliott, 593 S.E.2d at 280-281, 291-292 (citations omitted).[1]

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[1] Elliott presents inaccurate statements of fact. At page 4 of his petition, he states that Gragg told the police she was going to kill either Finch or herself; in fact, what Gragg told the officer was that, *if she stayed with Finch*, she was going to kill herself. (JA 544). Elliott states on the same page of his petition that Gragg "had [Finch] beaten in February, 1999;" however, the trial court properly *excluded* Elliott's proffered evidence on this issue which consisted of an affidavit filed by Finch during the couple's custody battles, *Elliott*, 593 S.E.2d at 288, and which Gragg denied under oath at Elliott's trial. (JA 548). Elliott states on page 6 of his petition that a polygraph test showed "Gragg was lying when she denied having planned to have Finch killed;" however, while the defendant argued below outside the presence of the jury that the police had informed Gragg that she had tested deceptive on a polygraph test, the record does not disclose the questions on which she tested deceptive. At page 9 of his petition, Elliott states that a "witness mentioned that Gragg had been questioned by a 'polygrapher'" in the presence of the jury; however, the witness never affirmatively stated that Gragg had been questioned by a polygrapher but rather, when asked by defense counsel if the witness knew an Officer Meyers who had interviewed Gragg, the witness asked counsel, "I believe you're referring to the polygrapher?" because there were two officers by that name. *Elliott*, 593 S.E.2d at 283; (JA 2116-18). Finally, Elliott states that the trial court "refused to require the Commonwealth to remedy false testimony" from Gragg; however, Elliott made no objection to Gragg's testimony as false and in fact expressly told the trial court that he did not ascribe to the Commonwealth any misconduct and was making no charge of presenting perjured testimony. *Elliott*, 593 S.E.2d at 286-87.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

1. The Court Below Found Petitioner's Challenge To The Vileness Factor Waived.

The petitioner argues that certiorari should be granted to decide whether Virginia's statutory vileness factor is unconstitutional. He states that the court below "summarily rejected" his argument and "also" found the claim not "properly preserved." In fact, the Virginia Supreme Court's *ratio decidendi*, after extensive analysis and discussion, was that Elliott waived his constitutional challenge when he failed to present it to the trial court after the mistrial had been declared and the second trial commenced:

> In his fifteenth assignment of error, Elliott contends that the trial court erred in overruling his motion to have Virginia's capital murder and death penalty statutes declared unconstitutional "on the ground that the 'vileness' aggravator . . . is unconstitutionally vague on its face and as applied in this case and therefore fails to provide meaningful guidance to the jury." This contention is an amalgam of three arguments raised by Elliott in the omnibus motion filed prior to his first trial challenging the constitutionality of the capital murder and death penalty statutes.
>
> In his sixteenth assignment of error, Elliott contends that "the trial court erred in failing to instruct the jury on the narrowing construction of the 'vileness' aggravator adopted by this Court." n9 Although it is not entirely clear from the argument he makes on brief with respect to this assignment of error, it would appear that Elliott is asserting the same argument as was made in one section of the omnibus motion to have the

capital murder and death penalty statutes declared unconstitutional filed prior to his first trial. In any event, we can find nothing in the record of his second trial to suggest that he sought an instruction giving a "narrowing construction" of the vileness aggravator.

> n9 Elliott does not expressly state how the definition of the vileness aggravating factor should have been narrowed or limited in jury instructions. Presumably, Elliott is contending that the killing of Thrall lacked one or more of the elements tending to show that it involved "torture, depravity of mind or an aggravated battery to the victim." Elliott provides no authority for his assertion that this Court has "adopted" instructions to this effect, although we have permitted trial courts the discretion to provide further guidance as to the meaning of these terms.

In his seventeenth assignment of error, Elliott contends that "[t]he trial court erred in denying appellant's motion to instruct the jury to agree unanimously upon a single element of 'vileness.'" This argument was also raised in the omnibus motion filed prior to Elliott's first trial and in a separate motion filed prior to the first trial seeking a specific jury instruction. Elliott did not proffer an instruction to this effect during the penalty determination phase of his second trial.

The Commonwealth asserts that because Elliott did not renew the pre-trial motions from his first trial or ask that the trial court adopt its prior rulings on those motions in his second trial, he failed to preserve these issues for appeal. The

Commonwealth further contends that by agreeing to the jury instruction defining the vileness aggravating factor in his second trial and not proffering any alternative instructions, he has waived his claims that the trial court should have given "narrowing construction" and "single element of vileness unanimity" instructions.

In his reply brief, Elliott asserts that he was not required to reassert his pre-trial motions from his first trial because "the rulings in the first trial automatically carry over to the second one." For the same reason, Elliott contends that he was not required to proffer his alternative instructions limiting the vileness aggravating factor or requiring a unanimous determination of the elements making the crime vile, because the trial court had ruled on these issues prior to his first trial.

The cases that Elliott relies upon for his assertion that rulings from a mistrial carry over to a subsequent retrial are inapposite and distinguishable. . . .

We concur in the view expressed by the Commonwealth in the present case that when a criminal case ends in a mistrial, the rulings made by the trial court prior to or during the aborted trial do not automatically carry over to a subsequent retrial. Thus, a defendant may not rely upon objections made at an aborted trial to preserve issues for appeal following his conviction in a subsequent trial. *See, e.g., United States v. Palmer*, 122 F.3d 215, 221 (5th Cir. 1997) ("objections made at the aborted trial have no bearing on the retrial, as the two are entirely separate affairs"). Similarly, a defendant may not assert that rulings made on pre-trial motions

> prior to a mistrial are binding upon the trial court in a subsequent trial unless the trial court adopts those rulings on its own motion or in addressing a motion of one or both of the parties. . . . In the absence of a ruling in the second trial adopting the rulings of the aborted trial, the defendant is required to renew his motions with specificity in order to preserve the record of the trial court's rulings and the defendant's objections thereto for any subsequent appeal of the retrial.
>
> Elliott does not assert that the trial court adopted its prior rulings for purposes of his second trial, and we have not been directed to any place in the record where such was done or requested. *Accordingly, we hold that under these circumstances Elliott is barred from raising the issues asserted in this appeal in assignments of error fifteen, sixteen, and seventeen.* Additionally, we also agree that Elliott's failure to proffer in his second trial alternative instructions limiting the definition of the vileness aggravating factor or requiring unanimity on the elements of vileness acts as a waiver of the claim that the trial court should have given such instructions to the jury. n10
>
> > n10 We note further that, as framed within the omnibus pretrial motion challenging the constitutionality of Virginia's capital murder and death penalty statutes, Elliott's contention that the vileness aggravating factor is vague is a reassertion of an argument previously rejected by this Court on numerous occasions. . . .

Elliott, 593 S.E.2d at 288-90 (emphasis added).

The fact that the court below observed in a footnote that Elliott's assignment of error *also* was one which the court had rejected on its merits "on numerous occasions," cannot confer jurisdiction upon this Court to review the issue on its merits. In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Court made clear that,

> This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. . . . This rule applies whether the state law ground is substantive or procedural. . . . In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory. *See Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

Coleman, 501 U.S. at 729-30.

The Virginia Supreme Court rejected Elliott's claim of constitutional error on state law grounds independent from any federal law issue. The fact that it observed in a footnote that the claim also had no merit does not, and cannot, affect its independent judgment that the issue was waived by Elliott's non-compliance with state procedural

law. This Court thus lacks jurisdiction to entertain Elliott's claim on direct review of the state court's judgment.

Elliott's attempt to argue that the Virginia Supreme Court's state law procedural ruling was not "adequate" is groundless. (Pet. at 23-25). The court below regularly, even strictly, enforces its rule that objections will not be addressed on appeal which have not been preserved properly in the trial court. *See, e.g., Murray v. Carrier*, 477 U.S. 478 (1986). Every defendant in Virginia is on notice during a retrial that the record which will go up on appeal is that concerning the judgment under review. *See* Rule 5:10, *Rules of the Supreme Court of Virginia* (identifying the record on appeal as containing, for example, instructions given at the trial and exhibits offered into evidence); Rule 5:25 (no error sustained to ruling of trial court unless a contemporaneous objection was made). A retrial is a *new* trial and, unless there is an order from the court that specifies objections will continue from one trial to the next, the new trial starts with a clean slate. Indeed, that clearly was Elliott's understanding during his new trial because he in fact renewed motions before that new trial repeating his first trial's pretrial motions asking for allegedly exculpatory evidence regarding a Commonwealth's witness.

Elliott's recitation of Virginia Code § 8.01-384(A) is inapplicable: the statute simply removed the ancient duty of a party to make a "formal exception" to a ruling of a trial court once a contemporaneous objection has been made. It did not address in any way the obvious duty of a party to make the contemporaneous objection *during the trial which will be reviewed on appeal*. Finally, Elliott says that the rule applied in his case serves no "legitimate state interest" because it is merely a "renewal" requirement, such as the "formal exception" requirement done away

with by modern law. To the contrary, the rule that a party must bring to the attention of the trial court *during the trial* his objections, certainly is not a meaningless ritual. It serves the legitimate state interests of seeing that error is corrected at the earliest possible time and that a full record of the trial court's ruling may be examined on appeal. Elliott's clear failure to follow Virginia's settled contemporaneous objection rule disentitled him to complain on appeal.

II. Virginia's Vileness Aggravator Presents No Federal Issue And Is Not Vague.

A. Virginia's sentencing phase aggravating factors are not necessary to satisfy constitutional "narrowing" requirements.

Elliott complains about the adequacy of Virginia's penalty phase "vileness" aggravator – that the defendant's "conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved . . . depravity of mind or an aggravated battery to the victim." Va. Code § 19.2-264.4.[2] He asserts this factor fails to satisfy the state's constitutional obligation to narrow the class of defendants eligible for the death penalty. This Court, however, has made clear that the "narrowing function required for a regime of capital punishment may be provided in either of these two ways: the legislature may itself narrow the definition of capital offenses so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and

[2] Elliott does not challenge the jury's finding that his capital murder of Dana Thrall also constituted torture.

provide for narrowing by jury findings of aggravating circumstances at the penalty phase." *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988). Where the "narrowing function" is performed at the guilt phase, "[t]he fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process. . . ." *Id.* (Rejecting argument that death sentence was infirm because Louisiana's sentencing phase aggravating factor duplicated a guilt phase element of capital murder).

Because Virginia's system, like Louisiana's, narrows the class of persons for whom a death sentence is appropriate in the *guilt phase* through narrowly defined categories of capital murder, *see* Va. Code § 18.2-31, the additional sentencing phase aggravating factors are constitutional surplus under *Lowenfield*. Moreover, because Virginia is a *non-weighing* state, *see Tuggle v. Netherland*, 79 F.3d 1386, 1389 (4th Cir.), *cert. denied*, 519 U.S. 894 (1996), in which the constitutionally required narrowing function is satisfied in the *guilt* phase, an Eighth Amendment error cannot exist by virtue of the jury's superfluous finding of an additional sentencing phase aggravating factor. *See Stringer v. Black*, 503 U.S. 222, 231-32 (1992) (rejecting Mississippi's *Lowenfield* argument because Mississippi is a *weighing* state and "the difference between a weighing State and a nonweighing State is not one of 'semantics,' . . . but of critical importance. In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty.").

In other words, before Elliott's jury even entered the sentencing phase of trial, it already had performed the constitutionally required narrowing function by finding that Elliott had committed capital murder, defined as *the willful, deliberate and premeditated killing of more than one person in the same transaction*. Va. Code § 18.2-31(7). His case thus already had been narrowed by independent findings at the guilt phase: premeditation and a multiple murder. The question of whether or not the later, additional finding of the "vileness" factor in Elliott's non-weighing sentencing proceeding could be considered "vague" was irrelevant because the narrowing function of the aggravating factors already had been carried out during the guilt phase. Elliott's "vagueness" argument simply presents no compelling reason to grant certiorari because the issue cannot render his death sentence constitutionally invalid.

B. Virginia's "vileness" criteria of "depravity of mind" and "aggravated battery" are neither unconstitutional on their face nor as applied in Elliott's case.

In Elliott's case, the defendant's conduct clearly involved "depravity of mind" and "aggravated battery." "The evidence showed that Elliott murdered two innocent people in a brutal and premeditated manner, showing no remorse for and purposefully seeking to conceal his crimes. The murder of Thrall was particularly heinous in that it appears she was a victim of opportunity, killed while her young children were nearby and simply because she was present in the home with Finch or perhaps because she saw and could have identified Elliott." *Elliott*, 593 S.E.2d at 291. And the case for aggravated battery was beyond

dispute: the multiple gunshot wounds to Thrall's head and chest and the beating to her head which left her alive for a period of time, moaning in agony, unquestionably was vile under any definition.

As early as *Smith v. Commonwealth*, 248 S.E.2d 135 (Va. 1978), *cert. denied*, 441 U.S. 967 (1979), the Virginia Supreme Court narrowly defined the "vileness" sentencing phase aggravating factor. It defined "aggravated battery" as "a battery which qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder." *Smith*, 248 S.E.2d at 149. It defined "depravity of mind" as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." *Id.* The Virginia Supreme Court made clear that the Virginia legislature meant for these two aggravating factors to require more proof than simply what is required for an intentional killing. *Id.* Thus, in every case since *Smith* involving the "vileness" aggravating factors of "depravity of mind" and "aggravated battery" in which the sufficiency of the evidence of vileness was challenged, the Virginia Supreme Court has applied its narrowing definitions to the facts of the case.

Indeed, contrary to Elliott's misreading of *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Virginia "vileness" factor recited above is *identical* to the factor held to be facially constitutional in both *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Godfrey*, 446 U.S. at 432-33. The reason the Court found error in *Godfrey* was not because the vileness factor was facially unconstitutional, but because the Georgia Supreme Court in that case had upheld the death sentence on nothing more than a finding that the offense

was "outrageously or wantonly vile, horrible and inhuman." *Godfrey*, 446 U.S. at 428. In fact, in *Godfrey*, the prosecutor had stated *three* times in argument that the case *did not involve torture or aggravated battery* and the jury's verdict merely recited that the offense was "outrageously or wantonly vile, horrible and inhuman" without any reference to "aggravated battery," "depravity of mind," or "torture." *Id.* at 426. Of course, the facts of *Godfrey* bore out the prosecutor's concessions: the defendant engaged in an argument with his wife, grabbed a shotgun, followed her to her mother's home, shot his wife through a window killing her instantly with one shot, shot and killed her mother, again instantly with one shot, and then immediately called the police, waited until they arrived, and made a full confession. *Id.* at 425.

Moreover, it is equally clear that the Virginia Supreme Court long has held that such aggravated assaults as is demonstrated by Elliott's crimes fully satisfy all of the vileness components. *See Bennett v. Commonwealth*, 374 S.E.2d 303 (Va. 1988) (defendant bound, beat, and stabbed victim); *Boggs v. Commonwealth*, 331 S.E.2d 407 (Va. 1985) (defendant beat his 87-year-old neighbor with a piece of steel and then stabbed her); *Bunch v. Commonwealth*, 304 S.E.2d 271 (Va. 1983) (defendant shot his lover in the head, ransacked her house, and hung her from a doorknob); *LeVasseur v. Commonwealth*, 304 S.E.2d 644 (Va. 1983) (defendant beat victim and stabbed her with a carving fork and ice pick); *Whitley v. Commonwealth*, 286 S.E.2d 162 (Va. 1982) (defendant strangled victim, cut her throat, and inserted umbrellas into her anus and vagina *post-mortem*); *Coppola v. Commonwealth*, 257 S.E.2d 797 (Va. 1979) (defendant entered house with co-conspirators, robbed victim, and then choked and beat her to death).

The Virginia Supreme Court's application of its "vileness" definitions raises no federal constitutional issue meriting further review, even if it had applied those definitions in this case instead of finding the issue waived.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Commonwealth of Virginia,
Respondent herein.

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